United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

with affidavit

74-1284

To be argued by
MARY P. MAGUIRE

B P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1284

ANTHONY DE CARVALHO,

Petitioner,

—against—

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION FOR REVIEW OF AN ORDER OF THE BOARD OF IMMIGRATION APPEALS

RESPONDENT'S BRIEF

PAUL J. CURRAN,
United States Attorney for the Southern District of New York,
Attorney for Respondent.

MARY P. MAGUIRE,
LYDIA E. MORGAN,
Special Assistant United States Attorneys,
Of Counsel.

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RESPONDENT'S BRIEF

Statement of the Issue

Whether Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c), violates the petitioner's constitutional right to equal protection of the laws in that the statute permits a lawful permanent resident alien who is the subject of an exclusion proceeding to apply for discretionary relief in the form of a waiver of inadmissibility but precludes a lawful permanent resident alien who is the subject of a deportation proceeding from applying for such relief.

Statement of the Case

The petitioner, Anthony de Carvalho (Carvalho), petitions this Court for review of an order entered by the Board of Immigration Appeals on February 21, 1974. In that order the Board dismissed Carvalho's appeal from an order of an Immigration Judge which denied the petitioner's mo-

tion to reopen his deportation proceedings to permit him to apply for discretionary relief in the form of a waiver of inadmissibility pursuant to Section 212(c) of the Immigration and Nationality Act (the "Act"), 8 U.S.C. § 1182(c). The Board held that Section 212(c) relief is not available to an alien in a deportation proceeding.[1]

This Court has jurisdiction under Section 106 of the Act, 8 U.S.C. § 1105a.

Statement of Facts

Anthony de Carvalho is an alien, a native and citizen of Portugal. He was admitted to the United States for lawful permanent residence on December 10, 1956. He has resided continuously in the United States since his admission.

The petitioner was arrested by United States Customs officers at Naco, Arizona on September 13, 1967 after he had gained entry by claiming to be a citizen of the United States. He was charged with possession of 63 pounds of marihuana in violation of 21 U.S.C. § 176(a) (T. 15).* On November 27, 1967, the petitioner was convicted as a youthful offender on his plea of guilty to a violation of 21 U.S.C. § 176(a), *i.e.*, possession of 63 pounds of marihuana (T. 14). He was committed to the custody of the Attorney General for treatment and supervision until discharged by the Youth Correction Division of the Board of Parole in accordance with the provisions of 18 U.S.C. § 5010(b).

On March 18, 1968, the Immigration and Naturalization Service (the "Service") commenced deportation proceedings

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[1] The Board also noted that it does not have jurisdiction to determine the constitutionality of the statutes which it interprets.

* References preceded by the letter "T" are to the tabs affixed to the Certified Administrative Record filed with the Court.

against Carvalho by the issuance of an order to show cause and notice of hearing (T. 13). A deportation hearing was held on March 27, 1968 and, upon his admission of the truth of the factual allegations in the order to show cause, the petitioner was found deportable under Section 241(a)(11) of the Act in that he had been convicted of a violation of a law relating to illicit traffic in marihuana, namely, possession of marihuana in violation of 21 U.S.C. § 176(a). Carvalho made no application for relief from deportation and the Immigration Judge ordered that he be deported to Portugal (T. 12). Carvalho waived his right to appeal the order to the Board of Immigration Appeals.

The petitioner was released on parole from a federal penitentiary on August 28, 1968. His deportation was stayed until January, 1969 (T. 10). On April 4, 1969, Carvalho's case was designated as a "nonpriority" case and no further steps were taken to effect his deportation.[2]

However, on March 4, 1971, while still on parole, the petitioner was arrested by New York City police for attempted criminal possession of a dangerous drug, namely, heroin. The charge was dismissed on the same date. However, as a result of the arrest, the petitioner's failure to report it to his parole officer and his admitted use of narcotics, Carvalho's parole was revoked and he was returned to federal prison on June 1, 1971. The petitioner's case was removed from the nonpriority category on January 31, 1972. By notice dated February 15, 1972, Carvalho was advised that upon his release from prison, the outstanding final order of deportation dated March 27, 1968 would be executed and he would be deported to Portugal.

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[2] Nonpriority cases refer to a category of cases where the Service will not enforce the deportation of an alien on the ground that such action would be unconscionable because of the existence of compelling humanitarian factors. See *Lennon* v. *Richardson*, —— F. Supp. ——, 73 Civ. 4476 (S.D.N.Y. May 1, 1974) (J. Owen).

On December 18, 1972, Carvalho was released to the custody of the Service and was granted a stay of deportation until March 18, 1973. The Service then paroled him on the same date and placed him under an order of supervision pursuant to Section 242(d) of the Act, 8 U.S.C. § 1252(d).

By notice of motion dated January 24, 1974, petitioner's attorney moved to reopen the deportation proceeding so that Carvalho could apply for discretionary relief pursuant to Section 212(c) of the Act, 8 U.S.C. § 1182(c). Additionally, on January 25, 1974, the petitioner applied for a stay of deportation which was denied on January 28, 1974. The motion to reopen the deportation proceeding was denied by the Immigration Judge on February 5, 1974. The Immigration Judge held that since discretionary relief, *i.e.*, waiver of inadmissibility, was statutorily not available in a deportation hearing, there was no basis upon which Carvalho could claim the benefits of the waiver (T. 5).[3] Since the Immigration Judge has no jurisdiction to rule on the constitutional attack against Section 212(c), he did not reach the question of whether petitioner's constitutional right of equal protection was denied by the fact that the waiver provided for in Section 212(c) is available only to an alien in an exclusion proceeding and not to an alien in a deportation proceeding, even if the alien has the requisite period of residence in the United States (T. 5).

Carvalho appealed the decision of the Immigration Judge to the Board of Immigration Appeals which dismissed his appeal by order dated February 21, 1974 (T. 1). The Board held that the motion to reopen had been properly denied in that an alien in a deportation proceeding could not seek a

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[3] The Immigration Judge also found that there was no evidence to support the petitioner's contention that he might have erroneously waived his right to counsel in the deportation proceeding.

waiver of inadmissibility pursuant to Section 212(c) of the Act which applies only to exclusion proceedings. The Board noted that it did not have jurisdiction to reach the constitutional question presented by the petitioner.

This petition for review was filed on February 28, 1974 and the petitioner's deportation was stayed pursuant to Section 106 of the Act, 8 U.S.C. § 1105a(a)(3).

Relevant Statutes

Immigration and Nationality Act, Section 212 (8 U.S.C. § 1182):

> Sec. 212.(a) Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:
>
> * * * * *
>
> (23) Any alien who has been convicted of a violation of, or a conspiracy to violate, any law or regulation relating to the illicit possession of or traffic in narcotic drugs or marihuana, or who has been convicted of a violation of, or a conspiracy to violate, any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation, or the possession for the purpose of the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, or exportation of opium, coca leaves, heroin, marihuana, or any salt derivative or preparation of opium or coca leaves, or isonipecaine or any addiction-forming or addiction-sustaining opiate; or any alien who the consular officer or immigration officers know or have reason to believe is or has been an illicit trafficker in any of the aforementioned drugs;
>
> * * * * *

(c) Aliens lawfully admitted for permanent residence who temporarily proceeded aboard voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of paragraphs (1) through (25) and paragraph (30) of subsection (a). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under Section 211(b).

Immigration and Nationality Act, Section 241 (8 U.S.C. § 1251):

Sec. 241.(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

* * * * *

(11) is, or hereafter at any time after entry has been, a narcotic drug addict, or who at any time has been convicted of a violation of, or a conspiracy to violate, any law or regulation relating to the illicit possession of or traffic in narcotic drugs or marihuana, or who has been convicted of a violation of, or a conspiracy to violate, any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation, or the possession for the purpose of the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, or exportation of opium, coca leaves, heroin, marihuana, any salt derivative or preparation of opium or coca leaves or isonipecaine or any addiction-forming or addiction-sustaining opiate;

* * * * *

ARGUMENT

Congress, in exercising its plenary authority to make rules for the deportation and exclusion of aliens, may validly make discretionary relief available to one class of aliens and preclude such relief to another class of aliens.

a. Background

This petition for review raises a constitutional question concerning the administration and enforcement of this country's immigration laws. It requires the interpretation of an ameliorative provision of the Act, which affords to a specific class of aliens the right to apply for a discretionary waiver of inadmissibilty but which does not give that right to an alien who is the subject of a deportation proceeding. The precise issue raised in this case is whether the statute, Section 212(c) of the Act, 8 U.S.C. § 1182(c), violates the constitutional right of a lawful permanent resident alien to equal protection of the law in that the statute permits an alien in an exclusion proceeding to apply for a waiver of inadmissibility but precludes an alien in a deportation proceeding from applying for such a waiver.

Section 212(c) of the Act provides that an alien who is *excludable* from the United States under Section 212(a) of the Act may be granted a waiver of inadmissibility in the discretion of the Attorney General. In order to be eligible for this waiver, the alein must have been (1) lawfully admitted for permanent residence; (2) have temporarily proceeded aboard voluntarily and not under an order of deportation; and (3) be returning to a lawful unrelinquished domicile of seven consecutive years. An alien who is excludable under Section 212(a) of the Act, paragraphs (1) through (25) and paragraph (30), may be admitted in the discretion of the Attorney General if the alien satisfies the

statutory prerequisites. Thus, it is clear that by the express terms of the statute itself, Congress has provided that such a waiver is applicable only to excludable aliens and not aliens under a final order of deportation.

An alien who is deportable under Section 241 of the Act has other forms of discretionary relief from deportation available to him. Section 244 of the Act provides that an alien's deportation may be suspended in the discretion of the Attorney General and the alien be permitted to remain in the United States. In addition, a deportable alien may apply for an adjustment of status pursuant to Section 245 of the Act and, if the adjustment is granted, deportation proceedings can be terminated.

The petitioner, who was the subject of a deportation proceeding and not of an exclusion proceeding, moved to reopen his deportation proceeding in order to apply for the discretionary benefits of Section 212(c) of the Act. The motion was denied by the Immigration Judge and the Board of Immigration Appeals dismissed the petitioner's appeal. The denial of the motion to reopen was based on the finding that an alien who is the subject of a deportation proceeding and who has not departed voluntarily from the United States subsequent to becoming deportable cannot apply for the discretionary waiver of inadmissibility provided for in Section 212(c).

The legislative history of Section 212(c) indicates that this section and its predecessor statute were designed to ameliorate the impact of the reentry doctrine under which an alien resident who leaves the United States may be barred from reentry upon his return because he is excludable under the statute. In order to lessen the rigors of the reentry principle, which otherwise might command the exclusion and deportation of many long-time residents, Con-

gress fashioned a device to permit waiver of the defect. This was the so-called Seventh Proviso to Section 3 of the Immigration Act of 1917 which provided:

> "That aliens returning after a temporary absence to an unrelinquished United States domicile of seven consecutive years may be admitted in the discretion of the Attorney General, and upon such conditions as he may prescribe."

This language obviously dealt with aliens seeking entry. But experience in administration of the statute demonstrated a need to apply it also to afford relief for aliens in the United States. Thus an alien threatened with expulsion for an irregularity which could have been waived at the time of any prior entry was given a *nunc pro tunc* or retroactive waiver of this defect.

In studies preceding the enactment of the Immigration and Nationality Act, the Senate Judiciary Committee criticized certain aspects of Seventh Proviso procedures. It recommended that relief be restricted to aliens:

(1) lawfuly admitted for permanent residence;

(2) who had departed from the United States voluntarily and not under an order of deportation; and

(3) who were not excludable on subversive charges.[4]

These recommendations were adopted by Congress in enacting Section 212(c) of the Act.[5]

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[4] *S. Rep.* 1515, 81st Cong., 2d Sess., p. 384.

[5] See *R. Rep.* 1137, 82d Cong., 2d Sess., p. 12; *H. Rep.* 1365, 82d Cong., 2d Sess., p. 51.

b. Equal protection only bars the invidious classification

Carvalho contends that he has been denied equal protection of law because the discretionary relief provided for in Section 212(c) is available to a lawful permanent resident who is returning to an unrelinquished domicile of seven consecutive years in the United States after a voluntary, temporary absence abroad but is not available to him as a lawful permanent resident who has had a continuous domicile in the United States for well over seven years but who has not been absent from the United States since he became deportable. However, not all classifications or statutory discriminations violate the equal protection clause. In this regard this Court has stated:

> "It is only the invidious discrimination or the classification which is 'patently arbitrary [and] utterly lacking in rational justification' which is barred by either the 'due process' or 'equal protection' clauses. *Fleming* v. *Nestor,* 362 U.S. 603, 611 (1960); *Williamson* v. *Lee Optical Co.,* 348 U.S. 483, 484 (1955). A classification or regulation, on the other hand, 'which is reasonable in relation to its subject and is adopted in the interests of the community is due process.' *West Coast Hotel Co.* v. *Parrish,* 300 U.S. 379, 391 (1937); see *Louisville Gas and Electric Co.* v. *Coleman,* 277 U.S. 32, 37 (1928); *Taylor* v. *Brown,* 137 F.2d 654, 660 (Emergency C.A. 1943), *cert. denied,* 320 U.S. 787." *Gruenwald* v. *Gardner,* 390 F.2d 591, 592 (2d Cir.), *cert. denied, sub nom., Gruenwald* v. *Cohen,* 393 U.S. 932 (1968).

Thus, we see that equal protection does not require identity of treatment. It only requires that the classification rest on real and not feigned differences. The distinction must have some relevance for which the classification is made, "and that the different treatments be not so disparate,

relative to the difference in classification, as to be wholly arbitrary." *Washington* v. *United States,* 401 F.2d 915, 923 (D.C. Cir. 1968), *rehearing denied.*

The purpose behind the enactment of Section 212(c) was to lessen the impact of the reentry doctrine on aliens who had previously been lawfully admitted for permanent residence and who may be barred from reentry upon their return. For example, an alien who has been lawfully admitted to the United States for permanent residence and who has proceeded abroad temporarily and voluntarily may find that he is excludable upon his return to the United States because he has incurred a criminal record during his residence in the United States. If the alien satisfies the conditions set forth in the statute, the Attorney General, in his discretion, may waive the ground of excludability and the alien be readmitted to the United States. The language of the statute and the legislative history clearly establish that the waiver is meant to apply only in the case of an entry or adjustment of an irregular entry.

Furthermore, as this Court has stated:

> "The legislature's grant of discretion to accord a privilege does not imply a mandate that this must inevitably be done by examining each case rather than by identifying groups. . . . Nothing in this offends the basic concept that like cases should be treated similarly and unlike ones differently." *Fook Hong Mak* v. *Immigration and Naturalization Service,* 435 F.2d 728, 730 (2d Cir. 1970).

The precise issue presented by this petition has been ruled on only by the Ninth Circuit. In *Arias-Uribe* v. *Immigration and Naturalization Service,* 466 F.2d 1198 (9th Cir. 1972), the Court held that the discretionary relief provided for in Section 212(c) is not available to an alien who is the subject of deportation proceedings based on a narco-

tics conviction. The Court noted that the alien's deportation was being sought not because he was excludable at the time he last entered the United States, but because he was convicted of a narcotics offense after entering the United States. The court pointed out that the Attorney General is not given discretion by the immigration laws to waive or suspend deportation for narcotics offenders, nor is he authorized, once proceedings under Section 241(a) are begun, to allow such persons to leave the country voluntarily in lieu of deportation. See Section 244(a)(e) of the Act, 8 U.S.C. § 1254(a), (e). The Court stated that to hold that the Attorney General may consider an application for permission to reenter, made by a person who must be deported, would not only do violence to the clear language of Section 212(c) but would render inoperative those provisions of the Act which make deportation mandatory for aliens who have been convicted of narcotics offenses.

The petitioner, in arguing that the denial of the Section 212(c) waiver benefit to him in the deportation proceeding which is based solely on a narcotics conviction subsequent to his entry into the United States is violative of the equal protection clause, completely disregards the fact that Congress has provided several other means whereby an alien with long continuous permanent residence in the United States may obtain relief from deportation. For example, Section 244 of the Act provides that an alien who satisfies the statutory conditions may apply for suspension of deportation which may be granted in the discretion of the Attorney General. 8 U.S.C. § 1254. An alien who is subject to deportation may also apply for adjustment of status pursuant to Section 245 of the Act, 8 U.S.C. § 1255, and, again, his status may be adjusted to that of a lawfully admitted permanent resident in the discretion of the Attorney General.

The distinction contained in the statute between lawful resident aliens seeking reentry into the United States and

lawful resident aliens who are subject to deportation is, we submit, a valid one, reasonably related to the statutory scheme. One indispensable element, in raising an Equal Protection issue, is the existence of some right which is adversely affected or impinged upon. In this case, however, the petitioner can point to no such right, fundamental or otherwise, which is adversely affected by the statutory scheme. Thus, in our view, there is no Equal Protection issue in this case.

If there is any right being asserted in this case, it is the supposed right of Carvalho to remain in this country on the basis of a waiver of his deportability for a narcotics conviction. Quite simply however, he has no such right. He was not given such a right when he entered the country because he was admitted subject to the immigration laws of the United States. He has no such right under the Constitution which contains no requirement that a deportable alien be allowed to remain, and he has no such right under any statute. Indeed, the statute provides for his deportation, and in accordance with the statute he has been ordered deported.

The Act clearly reflects the difference in the Congressional attitude towards, on the one hand, those convicted of ordinary crimes and, on the other, those convicted of crimes relating to drugs and narcotics. Section 212(a)(23) of the Act provides that an alien who has been convicted of a "violation of . . . any law or regulation relating to the illicit possession of or traffic in narcotic drugs or marijuana . . ." is ineligible to receive a visa and shall be excluded from admission to the United States. Although Congress has provided for a waiver of excludability for persons seeking admission to the United States for permanent residence who may be excludable under certain sections of the Act, where their exclusion would result in hardship to a citizen or lawful resident spouse or child, it has not seen fit to include excludability under Section 212(a)(23) of the Act among those grounds eligible for such a waiver.

It may be noted that this difference of attitude towards, on the one hand, those convicted of ordinary crimes and, on the other, those convicted of crimes relating to drugs and narcotics is also reflected in Section 241(b) of the Act. That provision of law provides that the persons who might be deportable by reason of their conviction for crimes may be excused from such consequences if they have been granted a full and unconditional pardon for such crimes or if the court sentencing such alien for such crimes makes at the time of first imposing sentence a recommendation to the Attorney General that such alien not be deported. The section specifically states, however, that these two provisions relieving the alien from deportability despite his conviction of a crime shall not apply in the case of any alien who is charged with being deportable from the United States under Section 241(a)(11), the deportation section which corresponds to Section 212(a)(23) governing exclusion from the United States for narcotics offense.

The cases cited by petitioner with respect to his equal protection argument are, we submit, clearly inapplicable to the issue raised in this petition for review. Each of the cases cited by the petitioner in support of his equal protection argument relates to *state* statutes and regulations which were held to unconstitutionally deny certain aliens the equal protection of law. As the Supreme Court stated in *Graham* v. *Richardson,* 403 U.S. 365 (1971), however, Congress has provided the Attorney General with "broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization." See also *Chinese Exclusion Case,* 130 U.S. 581 (1889); *Harisiades* v. *Shaughnessy,* 342 U.S. 580 (1952). Pursuant to that power Congress has provided a comprehensive plan for the regulation of immigration of aliens into the United States, including a plan for the exclusion and deportation of undesirable aliens.

In summary, then, the restriction of the waiver defined in Section 212(c) to lawful resident aliens seeking to reenter the United States or to validate an irregular entry is a proper exercise of Congressional authority because it is a reasonable attempt to provide relief from exclusion to long-term permanent resident aliens who would not be eligible to apply for the benefit of the statutes which are available to long-term lawful permanent resident aliens who are the subject of deportation proceedings.

CONCLUSION

The petition for review should be dismissed.

Respectfully submitted,

PAUL J. CURRAN,
United States Attorney for the Southern District of New York,
Attorney for Respondent.

MARY P. MAGUIRE,
LYDIA E. MORGAN,
Special Assistant United States Attorneys,
Of Counsel.

CA 74-1284

Form 280 A-Affidavit of Service by Mail
Rev. 3/72

AFFIDAVIT OF MAILING

State of New York)
County of New York) ss

Pauline Troia, being duly sworn, deposes and says that she is employed in the Office of the United States Attorney for the Southern District of New York.

That on the 24th day of June 1974 she served two copies of the within govt's brief

by placing the same in a properly postpaid franked envelope addressed:

Morton B. Dicker, Esq.,
The Legal Aid Society,
11 Park Place
New York, NY 10007

And deponent further says she sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Pauline Troia

Sworn to before me this

24th day of June 1974

Ralph I. Lee

RALPH I. LEE
Notary Public, State of New York
No. 41-2292838 Queens County
Term Expires March 30, 1975